

CHAPTER 39

CURRENT ISSUES IN LABOR AND EMPLOYMENT LAW

I. MILITARY EXTRATERRITORIAL JURISDICTION ACT OF 2000 (PENDING)

- A. On 25 July 2000 the House of Representatives passed an amended version of Senate Bill 768 (**Appendix A**). The Bill is currently in the Senate for action. The Senate Bill amended the UCMJ to provide court-martial jurisdiction over civilians. The House amendments eliminate this controversial provision.
- B. The Act establishes federal criminal jurisdiction over dependents, civilian employees, and contractors accompanying the force outside the United States.
- C. Offenses covered are those punishable by imprisonment for more than 1 year if the conduct had been engaged in within the United States.
- D. The current version of the House Bill provides Military Counsel for any proceeding conducted outside the United States.
- E. A version of the House Bill is expected to pass. If enacted, the Military Extraterritorial Jurisdictional Act of 2000 fills a major jurisdictional gap created by the Supreme Court's decision in Reid v. Covert, 354 U.S. 1 (1957).
 - 1. The Act increases the options available to a commander overseas.

*MAJ David Caldwell
MAJ Holly O'Grady Cook
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2. A prime example of the need for this legislation was recently addressed by the U.S. Court of Appeals for the Second Circuit in *U.S. v. Gatlin*, NEW YORK LAW JOURNAL, June 21, 2000, *available at* LEXIS, All Sources Legislative News Stories. The Court reluctantly held the District Court lacked jurisdiction over a military dependent that plead guilty to sexually assaulting a minor while accompanying his spouse in Darmstadt, Germany. The Military Jurisdiction Act of 2000 would fill this jurisdictional gap.

II. ALTERNATIVE DISPUTE RESOLUTION

- A. Agencies must establish an Alternative Dispute Resolution (ADR) Program during the EEO pre-complaint and formal complaint process. 29 C.F.R. 1614.102(b)(2). The EEOC issued a primer outlining the revised regulatory requirements for ADR. **Appendix B.**
- B. The Department of Defense has a Working Group for ADR. An ADR Point of Contact list for most DOD Agencies is at **Appendix C.**
- C. Air Force Alternative Dispute Resolution Program.
 1. A description of the Air Force ADR Program and a FY 99 review of the program are at **Appendix D.** For example, in FY 99 the Air Force program reduced the number of Formal EEO Complaints filed by 30%.
 2. The Air Force has developed an extensive guide to mediating civilian personnel workplace disputes. The guide includes techniques, processes, and forms to use in a program. This guide is an excellent starting point for any installation starting the ADR Program. **Appendix E.**
- D. The Navy established an EEO Complaint Pilot Dispute Resolution Process that is very aggressive and subject to criticism by the EEOC. **Appendix F.** The Pilot Program is designed to dramatically reduce the time it takes to resolve an EEO complaint. The EEOC believes the Navy program reduces a complainant's ability to seek EEOC review. **Appendix G.** Labor Counselors and Chiefs of Administrative Law should watch the issue develop, as the word on the street is the Navy is seeking a legislative fix. The proposed legislation could reduce, if not eliminate, EEOC involvement if a case follows the ADR path.

- E. Alternative Dispute Resolution is here to stay. The Army is currently fine-tuning the Army Program. Alternative Dispute Resolution is a growth industry that the Army, by necessity, must be good at if we want to prevail. What does this mean for SJAs?
1. In an era of reduced courts-martial and administrative boards, ADR allows an SJA another avenue to train JAGs. The material attached is great for your LPD program.
 2. Labor Counselors must get involved with EEO and work through the ADR Program at the installation. If they do not, the EEO office will develop a program and the SJA office will be in a reactionary mode.
 3. The Senior Officers coming through The Judge Advocate General's School are briefed on the mandatory ADR Program. Many are very interested, which means they will come to the SJA office for answers.

III. 29 C.F.R. 1614-ONE YEAR LATER

- A. The changes intended to streamline the process made little impact. The EEOC developed a primer that outlines the major changes and why they were made. **Appendix H**. However, the process is still cumbersome, expensive and time consuming. The chart at **Appendix I** provides a visual representation of the EEO complaint process.
- B. One of the major changes in 1614 was the requirement that Agencies appeal to the EEOC any Administrative Judge's decision they do not intend to implement. The standard of review on appeal is de novo. The appeal provision changed the previous practice of Agencies writing a Final Agency Decision that did not implement the AJ's findings. Even though this appears to be a significant change the Army has filed only one appeal in the last year. 29 C.F.R. 1614.107.
- C. Because most AJ decisions are not appealed, the role of the Labor Counselor in the EEO process is critical. Early intervention and active participation with the EEO office can significantly reduce adverse decisions and help resolve complaints at an earlier stage. The Labor Counselor's role has always been important, but it is more significant after the changes to 1614.

IV. MIDTERM COLLECTIVE BARGAINING

- A. Duty to Bargain. The Federal Service Labor-Management Relations Statute (FSLMRS) requires federal agencies and their employees' unions to meet and negotiate for the purposes of arriving at a collective bargaining agreement (CBA). 5 U.S.C. §7114(a)(4).
- B. When to Bargain.
 - 1. Contract: Management must negotiate with a new exclusive representative at the inception of a new contract and before renewal of an existing contract.
 - 2. Mid-Contract: When appropriate, management must continue to negotiate during the life of the contract.
 - a. Either party may refuse to bargain over issues covered by the CBA. Health and Human Services and AFGE, 47 FLRA 1004 (1993).
 - b. Both sides must negotiate over management-initiated midterm proposals.
 - c. Effective February 2000, unions also have the statutory right to initiate midterm bargaining. Department of the Interior and NFFE, Local 1309, 56 FLRA 45 (2000) (concluding that an agency must bargain over a proposal that obligates it to bargain over midterm issues not covered by the CBA).
- C. Preventive Measures.
 - 1. Waiver provisions. *See* Internal Revenue Service and NTEU, 29 FLRA 162 (1987) (explaining that a union can contractually waive its right to initiate bargaining); *but see* Department of the Interior and NFFE, Local 1309, 56 FLRA 45 (2000) (refusing to resolve whether waiver provisions are mandatory or permissive subjects of bargaining).

2. Covered-by Doctrine. *See* Department of Health and Human Services, Social Security Administration, 47 FLRA 1004 (1993) (establishing a three-prong test for determining when something is covered-by a CBA).

V. PARTNERSHIP UPDATE

- A. Executive Order 12,871 (1 October 1993).

Sec. 2. Implementation of Labor-Management Partnerships Throughout the Executive Branch. *The head of each agency subject to the provisions of chapter 71 of title 5, United States Code shall:*

(a) create labor-management partnerships by forming labor-management committees or councils at appropriate levels, or adapting existing councils or committees if such groups exist, to help reform Government;

(b) involve employees and their union representatives as full partners with management representatives to identify problems and craft solutions to better serve the agency's customers and mission; . . .

(e) evaluate progress and improvements in organizational performance resulting from the labor-management partnerships.

- B. Reaffirmation of Executive Order 12,871 (28 October 1999). *See* **Appendix J.**

1. Annual reports due 14 April.
2. Reports must be prepared with the involvement and input of unions.
3. Contents of the report.
 - a. Agencies shall describe the nature and extent of their efforts to comply with the Executive Order.

- b. Agencies shall identify specific improvements in customer service, quality, productivity, efficiency, and quality of worklife that have been achieved as a result of partnership.

VI. ENVIRONMENTAL DIFFERENTIAL PAY UPDATE

A. Requirement.

1. Wage grade employees must be paid environmental differential pay (EDP) when they perform duty that “involves unusually severe working conditions or unusually severe hazards.” 5 USC § 5343(a); 5 CFR § 532.511.
2. General Schedule employees must be paid a hazardous pay differential (HPD) when they are exposed to similar hazards. 5 USC § 5545(d); 5 CFR pt. 550.
3. Amount of pay differential depends on the type of employee and the type of hazard to which he is exposed.
4. Exposure to “airborne concentrations of asbestos” may result in 8% pay differential.

B. Amount of Exposure.

1. Agencies should include quantitative level of exposure that can be used to assess employee entitlement to pay differential in CBA.
2. If no quantitative amount in CBA, then arbitrators have broad discretion to determine appropriate level.

C. Arbitration Awards.

1. Local OMA funds used to pay awards and settlements.

2. Back pay limited to six years. *See* Interim Rule, Pay Administration; Back Pay; Holidays; and Physicians' Comparability Allowances, 64 Fed. Reg. 72,457 (28 December 1999) (clarifying that back pay awards are subject to a six year statute of limitations unless a shorter statute of limitations period applies).

VII. DUTY TO BARGAIN NEW EMPLOYEE BENEFITS

A. Duty to Bargain.

1. Personnel policies, practices, and matters that affect conditions of employment are generally negotiable. 5 USC § 7103(a)(14).
2. Matters contrary to statutory management rights are not negotiable. 5 USC § 7106(a) (e.g., mission, budget, organization, and internal security practices).
3. Management must usually negotiate "impact and implementation" of a nonnegotiable management rights decision. 5 USC § 7106(b)(2) & (3).

B. Giving new employee benefits may trigger statutory duty to engage in impact and implementation bargaining.

1. Bargaining obligation.
 - a. Give notice and opportunity to bargain. Union does not have to accept.
 - b. Implementation of new programs should be delayed until labor obligations have been fulfilled.
2. Examples of new employee benefits.
 - a. Mass transportation and vanpool transportation subsidies.

(1) EO 13,150 (21 April 2000).

(2) 5 USC § 7905.

(3) DoD Policy.

b. Expansion of NAF health care benefits.

(1) Appropriated fund employees have sick leave for family care purposes. *See* Final Rule, Sick Leave for Family Care Purposes, 65 Fed. Reg. 37,234 (13 June 2000).

(2) The NAF Office (ASA(M&RA)) has administratively adopted this regulation for NAF employees effective 2 August 2000. *See* **Appendix K**.

VIII. GENERAL COUNSEL GUIDANCE ON NEGOTIABILITY AND EEO LAWS.

A. Dispute Between Federal Labor Relations Authority (FLRA) and Equal Employment Opportunity Commission.

B. Federal Labor Relations Authority.

1. On January 26, 1999, the FLRA General Counsel issued detailed guidance to Regional Directors on how to apply the requirements of the FSLMRS to processing EEO complaints and bargaining over EEO issues. http://www.access.gpo.gov/flra/gc/gc_eeo1.html

2. Specific matters addressed in the guidance include:

a. The duty to bargain over changes in conditions of employment that are made as a result of terms contained in an EEO settlement agreement;

- b. When the union has a right to be represented at meetings where EEO complaints are a topic of discussion;
 - c. What, if any, rights the union has to EEO-related information under the FSLMRS; and
 - d. Strategies for avoiding unfair labor practices and contract disputes arising in the context of processing an EEO complaint.
3. An agency committed an unfair labor practice by holding a formal discussion with a bargaining unit employee without affording the union notice and an opportunity to be represented at the discussion. Luke Air Force Base, Arizona, and AFGE, Local 1547, 54 F.L.R.A. No. 75 (1998) (*pending 9th Circuit review*) (finding that a mediation/investigation session of an EEO complaint was a formal discussion).

C. Equal Employment Opportunity Commission.

- 1. July 1999 – EEOC issues Final Rule for Federal Sector Equal Employment Opportunity. *See* 29 CFR pt. 1614.
- 2. In the introduction to the final rule, the EEOC disagrees with FLRA General Counsel by stating:

Any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act.

IX. LABOR AND EMPLOYMENT WEB SITES.

A. Labor Law Web Sites

- 1. Office of Personnel Management <www.opm.gov>.
- 2. Merit Systems Protection Board <www.mspb.gov>.

3. Equal Employment Opportunity Commission <www.eeoc.gov>.
4. DOD Civilian Personnel Management System
<www.cpms.osd.mil>.
5. Army Civilian Personnel Office <www.cpol.army.mil>.
6. Federal Labor Relations Authority <www.flra.gov>.

B. Alternative Dispute Resolution Web Sites.

1. The Alternative Newsletter – A Resources Newsletter of Dispute Resolution <<http://www.mediate.com/tan/>>.
2. American Arbitration Association <<http://www.adr.org/>>.

C. ADR Resources

1. <http://adrr.com>
2. Center for Public Resources (CPR) <<http://www/cpradr.org>>.
3. Federal Judicial Center Publications
<<http://air.fjc.gov/public/fjcweb.nsf/pages/173>>.
4. US Air Force ADR Site <<http://www.adr.af.mil>>.
5. The Mediation Center, Eugene Oregon
<<http://www.mediate.com/resolution.cfm>>.
6. IOC Partnering Site
<<http://www.ioc.army.mil/others/Gca/partnering/index.htm>>.
7. Society of Professionals in Disputes Resolution (SPIDR)
<<http://www.spidr.org>>.

8. US Navy ADR Site <<http://adr.navy.mil>>.
9. Defense Logistics Agency
<<http://www.dscc.dla.mil/offices/doccr/adr/adr.html>>.
10. Section on Public Contract Law, American Bar Association (ADR Committee)
<<http://www.abanet.org/contract/special/altdisp/home.html>>.
11. ADR Interagency Working Group
<<http://www.financenet.gov/iadrwg.htm>>.
12. Lycos ADR Resources
<http://dir.lycos.com/Society/Law/Legal_Support/Dispute_Resolution_Services/Private_Mediation/>.
13. Northern Virginia Mediation Service
<<http://www.gmu.edu/departments/nvms/>>.
14. Mediation Information & Resource Center (MIRC)
<<http://www.mediate.com>>.
15. ADR World <<http://www.adrworld.com/>>.

X. CONCLUSION

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